Supreme Court, U.S.
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No. 95-1478

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Petitioner

*Counsel of Record

67 pp

QUESTION PRESENTED

Whether Congress has power under the U.S. Constitution, Article I, § 8 and the Tenth Amendment, as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command State-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. § 922(s)(2), (6)(B) and (C).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995). The petition for rehearing and suggestion of rehearing en banc were denied without opinion. (Pet. App. 28a.) The opinion of the District Court (Pet. App. 30a) is reported as *Printz v. United States*, 854 F.Supp. 1503 (D.Mont. 1994).

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1995. The order denying the petition for rehearing and suggestion for rehearing en banc was entered

on December 19, 1995. The petition for a writ of certiorari was filed on March 15, 1996, and was granted on June 17, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTE

U.S. Const., Art. I, § 8, cl. 3, and Amend. X, and the Brady Handgun Violence Protection Act, Pub. L. 103-159, 107 Stat. 1536 (1993), Secs. 101-106, are set forth at Pet. App. 75-93a.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Sheriff/Coroner Jay Printz is a chief law enforcement officer ("CLEO") commanded by 18 U.S.C. § 922(s) to perform background checks and make legal determinations concerning handgun purchases, to destroy records on purchasers, and to explain denials. His complaint against the United States sought a declaratory judgment that § 922(s) is inconsistent with Art. I, § 8 and the Tenth Amendment to the United States Constitution.

The district court held that § 922(s)(2) is unconstitutional under Art. I, § 8 and Amend. X, but upheld the remainder of § 922(s). (Pet. App. 66a.) Following *New York v. United States*, 505 U.S. 144 (1992), the court found that the ascertainment/background check requirement "substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program." (Pet. App. 66a.) The

United States was permanently enjoined from enforcing § 922(s)(2) in Montana. (Pet. App. 67-68a, 74a.)

Both the plaintiff and the defendant appealed. This case was heard jointly with the appeal of *Mack v. United States*, 856 F.Supp. 1372 (D.Ariz. 1994). Federal jurisdiction was based on 28 U.S.C. § 1291. In a 2-1 opinion (Judge Fernandez dissenting), the Court of Appeals upheld the constitutionality of § 922(s), reversing the judgment of the District Court that § 922(s)(2) is unconstitutional. The Court of Appeals thereafter denied the petition for rehearing and suggestion for rehearing en banc. (Pet. App. at 28a.)

(ii) Facts

Sheriff/Coroner Jay Printz, pursuant to Mont. Const., Art. XI, § 3, is the chief law enforcement officer of Ravalli County, Montana. Mont. Code § 7-32-2121 provides that the sheriff must preserve the peace, arrest persons who commit public offenses, suppress riots, attend court, keep the detention center, and lead search and rescue units.[1]

The Sheriff's staff includes an undersheriff, 4 detectives, a lieutenant, a patrol sergeant, and 7 deputies. Ravalli County has 30,000 residents in 2400 square miles. On average, two deputies are on patrol. Urgent responses and investigations make it difficult to conduct routine patrol. Performance of background checks "will have to be done by

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[1] Printz is also the county coroner, whose duties as defined in Mont. Code § 7-4-2911 include the holding of inquests, inquiring into the causes of deaths, gathering evidence, and notifying kin.

pulling deputies off patrol and investigation duties." (Jt. App. 14a.)

Sheriff Printz described records the Brady Act requires to be searched as including: the NCIC, which is electronically retrievable but only reflects warrants; the CJIN, which includes Montana convictions but not restorations of civil rights; county court criminal records, which may be handsearched for criminal convictions and restorations of rights, but would require as much as six hours driving time one way; State hospital records, which include mental commitments, which are three hours driving time away and may not be accessible; county court civil records, which include persons adjudicated as mental defectives or found to be a danger to self or others; veteran's hospital, which includes mental and drug records which are three hours driving time away and may not be accessible; and drug use, evidence of which is found in law enforcement and misdemeanor court records and in medical and drug treatment records. (Jt. App. 10-13a.)

A background check might require anywhere between an hour to several days. Ravalli County has 169 licensed firearms dealers, and residents also purchase handguns in the other 55 counties of Montana. (Jt. App. 14a.) The effect of § 922(s) is that "the citizens of Ravalli County will be harmed by a significant reduction in patrol strength and the availability of law enforcement personnel for crime prevention, investigation, and response." (Jt. App. 16a.)

Sheriff Printz has no mechanism for carrying out the duties assigned by § 922(s) and no budget provision

authorizing the expenditures. He is personally liable for expending funds without authorization.[2] (Jt. App. 15a.) The duties of § 922(s) conflict with Mont. Code § 45-8-351(1), which provides:

> No county . . . or other local government unit may prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun.

Sheriff Printz described severe personnel shortages in the department, which ranked second to last in Montana for officer-to-citizen ratios. (Jt. App. 25a.) A litany of never-ending brush fires strained the department's personnel and budget, from extraditions and mental patient transport to burglaries and drug investigations. (Jt. App. 27a, 36a.) No time existed for traffic and DUI control, and an unsolved homicide existed. (Jt. App. 28a, 36-37a.) Execution of the Brady law would make the department unable to respond to "a domestic abuse in progress, or any number of serious things." (Jt. App. 29a.) As the Sheriff's Office Annual Report related:

> We are increasingly being asked, and sometimes ordered, to do more with less as evidenced by the "Brady Law". . . . We are, however, utilizing our patrol vehicles long past their safe limits, the DARE

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[2] *See* Mont. Code §§ 7-4-2110, 7-4-2203 (power of board of county commissioners to supervise officials, including sheriff, charged with the disbursement of public revenues, to see that they perform their duties, and to prosecute delinquencies).

> program grant is running out and we are burning out our employees and volunteers . . . . (Ex. 3, Jt. App. 22-23a, 30a.)

Sheriff Printz did not personally know 80% of the county residents. (Jt. App. 36a.) Bureau of Alcohol, Tobacco and Firearms ("BATF") forms received by his department indicated that out of 101 proposed handgun sales, 83 purchasers were born out of State. (Jt. App. 18a, 30a.) Approval based on an NCIC search is insufficient. If he approved a person who later committed a crime, Sheriff Printz would be blamed. (Jt. App. 35a.)

Based on the above undisputed evidence, the District Court found:

> The impact of the mandates of the Act is far from *de minimis*. The ascertainment/background check provision is most burdensome. CLEOs must perform these background checks on every potential transferee, must determine the applicable law on which the ascertainments are made, and must determine whether each transfer violates the law. These are substantial undertakings, some involving the exercise of discretion, which may be performed--if at all--only with great effort and the expenditure of unfunded resources. (Pet. App. at 60a.)

SUMMARY OF ARGUMENT

Sheriff Printz was elected to enforce the criminal laws of Montana. 18 U.S.C. § 922(s) orders the chief law

enforcement officer ("CLEO") of every locality to ascertain within 5 business days whether receipt of a handgun is lawful, including research in State, local, and national records. The CLEO is commanded to destroy information on lawful handgun purchasers within 20 days. If receipt of the handgun is determined to be unlawful, the CLEO is required to explain why.

Congress has no power under Article I, § 8 of the Constitution to issue these commands, which violate the Tenth Amendment. *New York v. United States*, 112 S.Ct. 2408 (1992) held that Congress cannot order States to enact or administer a federal regulatory program.

Article II of the Constitution provides that the President, not State CLEOs, shall take care that the laws be faithfully executed and shall appoint officers for this purpose. The duties of the States enumerated in the Constitution do not include execution of federal criminal law.

The unconstitutional commands are not severable from the waiting period, notice requirements, and CLEO veto power provided in § 922(s). Congress passed a mandatory duty to check records and an optional waiting period, not an optional duty to check records and a mandatory waiting period. Without the duty to destroy records, which is intended to protect privacy rights, Congress would not have required dealers to provide the records to CLEOs. Absent the duty to explain a denial, Congress would not have allowed the CLEO to veto the transfer of the handgun.

ARGUMENT

CONGRESS MAY NOT CONSCRIPT LOCAL LAW ENFORCEMENT OFFICERS TO ENFORCE THE BRADY ACT

New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 2435 (1992) held: "The Federal Government may not compel the States to enact or administer a federal regulatory program." Five of six district courts held that the commands to chief law enforcement officers in 18 U.S.C. § 922(s) are unconstitutional. In a 2-1 opinion (Judge Fernandez dissenting, Pet. App. at 22a), the Ninth Circuit in the instant case reversed two of those decisions, *Printz* and *Mack*, and upheld the Act. The Second Circuit agreed with the Ninth Circuit, but the Fifth Circuit held the commands to be unconstitutional.[3]

I. DUTIES IMPOSED BY THE BRADY ACT

Effective on February 28, 1994, § 102(a) of P.L. 103-159, 107 Stat. 1536 (1993) amended 18 U.S.C. to create § 922(s). (Pet. App. at 75a.) § 922(s)(1)(A) makes it unlawful for a federally licensed firearms dealer to transfer a handgun without obtaining a statement of personal information from

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[3] *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *rev'g* 852 F.Supp. 1376 (W.D.Tex. 1994), and *aff'g McGee v. United States*, 863 F.Supp. 321 (S.D.Miss. 1994). *Accord, Romero v. United States*, 883 F.Supp. 1076 (W.D.La. 1995) (holding § 922(s)(2), (6)(B) and (C) unconstitutional). The commands were upheld in *Frank v. United States*, 79 F.3d 452), *rev'g* 860 F.Supp. 1030 (D.Vt. 1994) (holding the background check command unconstitutional).

the transferee and transmitting a copy to the chief law enforcement officer ("CLEO") where the transferee resides.[4] The dealer may transfer the handgun after five business days, unless the CLEO provides notice that the purchaser is ineligible. The handgun may be transferred sooner if the CLEO notifies the dealer that the transfer is lawful.

Three duties are imposed on the CLEO. First, § 922(s)(2) provides:

> A chief law enforcement officer to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

The Attorney General has designated "the National Crime Information Center (NCIC) as the national system to be used by law enforcement for crime history record background checks." 59 F.R. 9498 (Feb. 28, 1994).

The second duty is imposed by § 922(s)(6)(B), which provides:

> Unless the chief law enforcement officer to whom a statement is transmitted . . . determines that

---

[4] § 922(s)(8) provides that "the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."

> a transaction would violate Federal, State, or local law--(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required . . . .

The third command is made by § 922(s)(6)(C), which provides:

> If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide the reasons to the individual in writing within 20 business days after receipt of the request.

§ 925A provides that any person denied a firearm due to erroneous information provided by any State or political subdivision thereof "may bring an action against the State[5] or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer." Relief includes an order directing the correction of the erroneous information or "that the transfer be approved" by the CLEO, together with attorney's fees. § 922(s)(7) provides that a CLEO shall not be liable in an action at law for damages for

[5] *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1126 (1996) (Congress lacks power under Indian Commerce Clause, which delegates more power than Interstate Commerce Clause, to abrogate States' immunity from suit under the Eleventh Amendment).

failure to prevent a transfer to an unlawful recipient or for prevention of a transfer to a lawful recipient. Political subdivisions are not immune from damages actions.[6]

§ 924(a)(5) provides: "Whoever knowingly violates subsection (s) . . . of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both." On February 9, 1994, the BATF Brady Law Coordinator stated that "the criminal penalties certainly could be applied to CLEOs" who refuse to do background checks. (Blackman Aff., Pl. Exh. 6, at 1-2, Record 26.) BATF interprets the Act to "require" the CLEO to carry out the three duties. T.D. ATF-354, 59 F.R. 7110, 7111 (Feb. 14, 1994). BATF distributed an "Open Letter" to all CLEOs in the nation instructing them on their duties. (Appendix to Brief for the United States ["US App."] 1a.)[7]

In response to this lawsuit, the Assistant Attorney General for the Office of Legal Counsel opined that the criminal penalties do not apply to a CLEO. (Def. Exh. 2, Record 23.) However, the government argued that CLEOs who do not conduct searches are subject to mandamus

[6] *See Braman v. State of California*, 28 Cal.App. 4th 344, 33 Cal.Rptr.2d 608 (1994) (wrongful death action where State agency failed to investigate mental patient who bought handgun and committed suicide).

[7] The letter provided BATF's "interpretation of the Act so that you will be better able to fulfill the requirements the Act imposes" on CLEOs. (US App. 1a.) The BATF form for handgun purchasers includes "Instructions to Chief Law Enforcement Officers." *Id.* at 4a. Oblivious to the CLEOs' compelling duties to enforce State criminal laws, BATF implored: "The greatest immediate task before us is to implement the waiting period aspect of Brady by February 28, 1994." *Id.* at 5a.

actions and the contempt power. (Pet. App. 44-45a n. 19.)

§ 106(b) of the Brady Act authorizes $200 million in funds for grants to "each State" without regard to whether Brady checks are required. 59 F.R. 61639, 61640 (Dec. 1, 1994). The Department of Justice announced: "NCHIP funds may not be used to cover costs of conducting presale background checks." *Id.* at 61645.

The States may exempt themselves from these duties by enacting laws in conformity with Congress' directives set forth in § 922(s)(1)(C)[8] or (D).[9] BATF asserts the power "to determine which States are subject to the federal waiting period provisions and which qualify as 'alternative' States." 59 F.R. 37532, 37533-34 (July 22, 1994) (finding half the States exempt by reason of "instant check" or "permit or other approval type system").[10] The States' legislative processes are thus subject to federal agency veto.

Numerous records must be researched to ascertain whether receipt of a handgun would violate federal law, not to mention State or local law. 18 U.S.C. § 922(g) provides:

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[8] This provision exempts purchases where the transferee has a permit to possess a handgun issued by the State after the State has determined that the person may lawfully possess a handgun.

[9] This provision exempts States with laws requiring officials to verify that a person's handgun possession would not violate the law.

[10] BATF disapproved Arizona's instant check. (Ariz. Rev. Stat. §13-3114; *Mack* Record 58, Trans., May 31, 1994, at 60-62.)

> It shall be unlawful for any person--
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance . . . ;
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
>
> (7) who, having been a citizen of the United States, has renounced his citizenship; or
>
> (8) [who is subject to certain restraining orders involving an intimate partner]
>
> to . . . possess in or affecting commerce, any firearm . . . ; or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.[11]

To determine whether a person has been indicted for or convicted of a felony, a CLEO must search arrest, conviction, and appellate records and records of pardons,

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[11] Further, § 922(n) makes it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . receive any firearm . . . which has been shipped or transported in interstate or foreign commerce."

expungements, and restorations of civil rights.[12] The definition of "convicted" under § 921(a)(20) requires the CLEO to research the laws of potentially all fifty states and federal law.[13] The potential liabilities of an incorrect decision--injunction suits and electoral retribution to the CLEO, damages suits against the county--make study and legal advice imperative.

Medical, drug treatment, and police records must be searched to determine if a person is an unlawful drug user.[14] Medical and judicial records must be searched to determine if a person has been adjudicated as a mental defective or committed to an institution.[15] The Immigration and Naturalization Service must be contacted to verify that an

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[12] To determine whether one has received relief from disabilities under § 925(c), the Federal Register and court records must be searched.

[13] *Beecham v. United States*, 511 U.S. 368, 114 S.Ct. 1669, 1670-72 (1994) (federal and State choice-of-law issues); *United States v. Gomez*, 911 F.2d 219, 220-21 (9th Cir. 1990) ("the whole of state law," i.e., the rights to vote, hold office, and sit on a jury, determine whether a felon's rights are restored); *United States v. Eaton*, 31 F.3d 789, 792 (9th Cir. 1994) (applying North Dakota law to Montana resident).

[14] The Justice Department notes that drug use may be indicated in criminal records, drug treatment records, medical records, and drug test records. 60 F.R. 63727, 63730 (Dec. 12, 1995).

[15] "The Brady bill will keep guns out of the hands of . . . adjudicated mental incompetents." 139 CONG.REC. H9093 (Nov. 10, 1993) (remarks of Rep. Sensenbrenner). The Justice Department states that evidence of mental incompetency may be found in records of courts, boards, commissions, and other legal authorities. 60 F.R. 63727, 63730 (Dec. 12, 1995).

alien has a lawful status.[16] Records of fugitives,[17] dishonorable discharges, ex-citizens, and restraining orders involving intimate persons (e.g., in domestic relations cases) must be searched.[18] It must be determined whether the handgun to be purchased has ever been transported in interstate commerce, without which § 922(g) does not apply.

II. CONGRESS HAS NO POWER TO IMPOSE DUTIES ON CHIEF LAW ENFORCEMENT OFFICERS

A. This Court's Decision in *New York v. United States*

Article I, § 8 of the Constitution delegates no power to Congress to issue commands to local law enforcement officials, and the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The three duties imposed on CLEOs by § 922(s) are invalid because, as *New York v. United States*, 112 S.Ct. 2408, 2434-35 (1992), held:

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[16] 27 C.F.R. §178.130(a)(2) asks alien purchasers to include their alien registration numbers so that CLEOs can verify lawful residency with INS. *See* T.D. ATF-361, *ATF Quarterly Bull.-1*, 24 (1995).

[17] "This category includes persons (1) who know they have charges pending against them, even if only for a misdemeanor, and who leave the State of prosecution, or (2) who leave the State in order to avoid giving testimony in any criminal proceeding." 60 F.R. 63727, 63730 (Dec. 12, 1995).

[18] For the Department of Justice's comments on records in these various categories, *see* 60 F.R. 63727, 63730 (Dec. 12, 1995).

> State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," *The Federalist* No. 39, . . . reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: *The Federal Government may not compel the States to enact or administer a federal regulatory program.* (Emphasis added).[19]

The statute at issue required the States either to "enact" a program to dispose of radioactive waste according to Congress' directives, or to "administer" the program by taking title to and possession of the waste and by being liable for damages. 112 S.Ct. at 2416. It was well established that States cannot be ordered to "enact *and* enforce" federal programs. *Id.* at 2420, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). The statute in *Hodel* was constitutional because "the States are not compelled to enforce [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.*

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[19] Madison further explained in *The Federalist* No. 39 that the Constitution did not establish a purely national government in which "all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure." Instead, "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." 15 *Documentary History of the Ratification of the Constitution* 385 (1984).

Similarly, *New York* noted, the statute in *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) "require[d] *only* consideration of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 112 S.Ct. at 2420-21. The two Titles challenged in *FERC* were upheld because they "simply *condition* continued state involvement in a pre-emptible area on the consideration of federal proposals." *FERC*, 456 U.S. at 765. Further, the commission in *FERC* was part of the "state adjudicatory machinery" and thus was subject to Article VI of the Constitution, under which State judges are bound by federal law.[20] *Id.* at 761-62.

The Framers of the Constitution, *New York* explains, rejected the New Jersey Plan, under which federal laws would be executed by the States, and adopted the Virginia Plan, under which "Congress would exercise its authority directly over individuals rather than over States." 112 S.Ct. at 2422. Thus, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 2423.

If a CLEO does not search records and opine that a purchase is lawful, his constituents who purchase handguns must wait the full five business days; if the CLEO does not destroy the records, he violates his constituents' privacy

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[20] "No comparable constitutional provision authorizes Congress to command State legislatures to legislate." *New York*, 112 S.Ct. at 2429-30. *See Testa v. Katt*, 330 U.S. 386, 389-90, 394 (1947).

rights. As *New York* explains, such impositions blur responsibility:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. *Id.* at 2424.

Congress may offer financial incentives which give States the option not to do anything,[21] but it may not force the States to act or to spend:

> A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy . . . . The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. *Id.* at 2427.

The "choice" either of "regulating pursuant to Congress' direction" or of administering Congress' laws "'commandeer[s]' state governments into the service of federal regulatory purposes," and is invalid for these reasons:

> Because an instruction to state governments to

[21] *Id.* at 2423. "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.* at 2424. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (highway funds conditioned on minimum drinking age).

> take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. *Id.* at 2427-28.

Like its argument that the Brady Act allows a sheriff to decide what is a "reasonable" check, the government in *New York* emphasized "the latitude given to the States to implement Congress' plan." *Id.* Yet this "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." *Id.* at 2428-29.

Nor does the perceived need justify the means: "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 2429. Federal courts may order state officials to comply with duties imposed by the Constitution or a valid statute. *Id.* at 2430, citing *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (extradition statute based on U.S. Const., Art. IV, § 2). However, the Constitution "contains no analogous grant of authority to Congress." *Id.* at 2430.

This Court has upheld economic regulations which govern both public and private actors.[22] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)

[22] *Cf. South Carolina v. Baker*, 485 U.S. 505, 507-08 (1988) (repeal of tax exemption for interest on unregistered State bonds; no command to States involved).

(minimum wage laws applicable to private and public sectors). By contrast, the Brady Act orders only CLEOs, not all citizens, to check records, destroy records, and explain denials. As in *New York*, it is unnecessary "to apply or revisit" cases such as *Garcia*, "as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."[23] 112 S.Ct. at 2420.

Bowen v. American Hospital Assn., 476 U.S. 610 (1986) (opinion by Stevens, J.), invalidated federal regulations which commandeered State agencies as follows:

> The Rules effectively make medical neglect of handicapped newborns a state investigative priority, possibly forcing state agencies to shift scarce resources away from other enforcement activities . . . . The Rules also order state agencies to "immediately" review reports from hospitals, . . . to conduct "onsite investigations" . . . . *Id.* at 639.

The Brady Act makes handgun transfers "a state investigative priority," forcing CLEOs "to shift scarce resources away from other enforcement activities," and requiring them to "review" records and to conduct "investigations." *Bowen* explained: "State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their

[23] *Garcia* itself recognized the existence of "affirmative limits the constitutional structure might impose on Federal action affecting the States under the Commerce Clause." 469 U.S. at 556.

will as the foot soldiers in a federal crusade."[24] *Id.* at 642. Sheriff's departments are not field offices of the BATF, nor may they be conscripted for a federal crusade.

B. The Circuit Court Decisions

Koog v. United States, 79 F.3d 452 (5th Cir. 1996) declared the background check/ascertainment, record destruction, and explanation requirements unconstitutional. CLEOs "oversee the day-to-day functions demanded by the Brady Act," decide how intrusive a background check to conduct (which is paid for with local tax dollars), and "weigh these negatives against the extent of community support for background checks." *Id.* at 457-58 n. 4.

> Congress, thus, foists the core policy decision raised by the Brady Act onto the CLEOs. This certainly is a regulatory policy judgment sufficient to constitute "administration" even in the government's more restricted sense of that term, especially when the CLEO can be sued for the malperformance of those duties. *Id.*

State law creates the offices of and prescribes the duties of CLEOs. *Id.* at 458. The Brady Act "commandeers the legislative processes of the States," first, because it is "an edict to CLEOs that substantively enlarges the duties and

[24] "Important principles of federalism are implicated by any 'federal program that compels state agencies . . . to function as bureaucratic puppets of the Federal Government.'" *Id.* at 642, n. 29, quoting *FERC v. Mississippi*, 456 U.S. 742, 783 (1982) (opinion of O'Connor, J.).

authority given the CLEOs by the States, without the States' consent or participation," and in effect amends the State criminal codes. *Id.* at 459 & n. 7. Second, Congress has "secur[ed] the CLEOs' participation only by coercing the States." *Id.* at 459. Third, the Act "requir[es] a State to allow CLEOs to perform duties that the State obviously prefers to avoid," instead of enforcement of local laws, maintenance of jails, and transport of criminals. *Id.* at 460. Fourth, the Act "blurs accountability for the policy choices reflected in this legislation." *Id.* at 460.[25]

It is not *de minimis* that CLEOs must "check the backgrounds of countless applicants for handgun purchases," explain denials, destroy records, and be subject to suit for erroneous information. *Id.* at 460. Further, where no federal power to coerce the States exists, even an allegedly "minimal intrusion" is unconstitutional. Because the Act amounts to forced legislation and violates the principles of federalism, "it does not matter 'how powerful the federal interest involved' nor how much the intrusion may be downplayed." *Id.* at 462.

The *Mack* majority rewrites *New York*'s holding--that Congress "may not compel the States to enact or administer a federal regulatory program," 112 S.Ct. at 2434-35--to say that Congress may not "direct the States to enact their own legislation or regulations according to a federal formula." (Pet. App. at 10a.) This considers only the prong of *New York* prohibiting Congress from ordering the States to "enact"

[25] Voters will blame the CLEO for inconveniences and for diverting resources away from State priorities. Disapproved persons will sue the State or political subdivision for erroneous decisions. *Id.* at 461.

a federal program, and ignores the prong holding that Congress may not command the States to "administer" it.[26]

Mack asserts that *New York* "meant 'administer' in the sense of being in charge of a program and making policy decisions with respect to the program." (Pet. App. at 13a n. 7.) Yet the Brady Act forces CLEOs to search records and to render legal opinions applying the laws of the United States and all 50 States, which involve policy decisions. "Administer" means to execute law[27] or "to discharge the duties of an office." *Black's Law Dictionary* 65 (1968). *Mack* paints the gloss that the Tenth Amendment prohibits only "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program." (Pet. App. at 13a.) *New York*'s prong "to administer" is

[26] Presaging *New York* are decisions that the States may not be commanded to administer federal EPA regulations against motor vehicle owners. *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975) (scheme similar to what "would have existed during Prohibition if the Federal government had sought to compel police officers in a wet State to enforce the Federal laws on the subject"); *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975) ("not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to 'revise,' 'negative,' or 'annul' the laws of a state"); and *Brown v. EPA*, 521 F.2d 827, 835 (9th Cir. 1975) (regulation makes "the states departments of the Environmental Protection Agency no less obligated to obey its Administrator's command than are its subordinate officials"); *remanded for consideration of mootness*, *EPA v. Brown*, 431 U.S. 99 (1977).

[27] The "administration" of the Gun Control Act, which is vested in the Secretary of the Treasury, § 103, P.L. 90-618 (1968), includes issuing licenses, conducting background checks, and other duties similar to those in the Brady Act. 18 U.S.C. § 923; 26 U.S.C. § 5812.

obliterated; all that is left is the "to enact" prong.[28]

The implications of *Mack* are staggering. The entire workforces of the States and their political subdivisions may be conscripted for federal crusades.[29] If the "interference with their state duties is minimal" as defined by the federal judiciary (Pet. App. at 14a), every State and local official and employee, from the governor to the school teacher, may be ordered to execute federal laws.[30]

Mack asserts that CLEOs need do no more than check computer records and explain denials (Pet. App. at 16a), but § 922(s)(2) commands a CLEO to ascertain legality from all "available" State and local records and the national system. Only the latter is computerized, and it includes criminal records only. 59 F.R. 9498 (Feb. 28, 1994). Further, every notice of a purchase must be calendared for destruction, and a denial may require consultation with counsel to write an

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[28] *See Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993) (invalidating federal commands that States administer federal timber-export policies); D. Merritt, *Three Faces of Federalism*, 47 VANDERBILT LAW REV. 1563, 1580 (1994) (comparing *Brown* with district court decisions in *Printz* and *Mack*).

[29] S. Prakash, *Field Office Federalism*, 79 VA.L.REV. 1957, 1960, 2006 n. 247 (1993) argues that *New York* was wrongly decided and that "state tax collectors could be drafted into the service of the Internal Revenue Service. Local police could enforce federal criminal and civil law."

[30] *See United States v. Snyder*, 852 F.2d 471, 474-75 (9th Cir. 1988) (federal government may not "interfere with a state's exercise of its police power," and thus federal court may not direct State DMV to suspend driver's license, even though *de minimus*).

opinion able to withstand judicial scrutiny.

Mack finds the Brady Act "no more remarkable than, say, the federally-imposed duties of state officers to report missing children . . . or traffic fatalities." (Pet. App. 9a.) In fact, such reporting is voluntary.[31] But if emotionalism supersedes constitutional text and Congress has power to require States to report missing children, then surely the States have power to conscript federal agents to locate kidnapped and murdered children.

Frank v. United States, 78 F.3d 815 (2nd Cir. 1996), *rev'g* 860 F.Supp. 1030 (D.Vt. 1994), likewise makes no attempt to identify the constitutional source of Congress' power to issue commands to State officials, and obliterates *New York*'s holding that Congress may not command the States to "administer" a federal regulatory program. *Frank* transforms "enact or administer" into "to enact legislation or to promulgate regulations." *Id.* at 827, 829.

Frank finds no principled basis for Congress' alleged power here, but looks only to "the severity of the burden placed on States." *Id.* at 826-7. Brady checks taking from 15 minutes to six hours are not "so significant quantitatively" as violate the Constitution. *Id.* at 830. The constitutionality

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[31] The traffic-fatality reporting requirement is tied to the receipt of highway funds. 23 U.S.C. § 402(c). Missing children are reported to the National Crime Information Center (NCIC) (42 U.S.C. § 5779), a records exchange system used by the federal, State, and local governments. 28 U.S.C. § 534(a)(4). NCIC regulations apply to State and local agencies which receive federal funds, and failure to comply may terminate funding and access. 28 C.F.R. §§ 20.20, 20.25, 20.38.

of the law depends on whether federal judges believe that a CLEO is too busy or not.

C. The Commands are not Authorized by any Enumerated Power

Nothing in § 922(s) or its legislative history suggests any enumerated power in the Constitution which justifies its commands to CLEOs. The power to regulate interstate commerce does not include a power to conscript CLEOs. The Constitution delegates the enforcement of federal law to the President, who has the power of appointment and removal. The Constitution is explicit concerning limited duties of the States *vís-a-vís* federal law enforcement.

1. The Commerce Clause

Art. I, § 8 of the Constitution delegates no power to Congress to issue the commands here. If one speculates that Congress sought to exercise its power to regulate interstate commerce,[32] it may not do so by conscripting State-created CLEOs, who are not engaged in interstate commerce. The commerce clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 112 S.Ct. at 2423.

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[32] Some Gun Control Act provisions are based on powers other than the commerce clause. *E.g.*, 18 U.S.C. § 930 (prohibition on firearm at federal building); U.S. Const. Art. I, § 8, cl. 17 (Congress may exercise exclusive legislation over federal buildings). *See United States v. Thompson*, 687 F.2d 1279, 1285 (10th Cir. 1982).

United States v. Lopez, 115 S.Ct. 1624, 1626 (1995) declared the federal Gun Free School Zones Act unconstitutional because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." Nor is being a CLEO a commercial activity or connected to interstate commerce.[33] It cannot be argued that commerce is affected if CLEOs do not conduct Brady checks, for Congress may not regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 1632.

The government's theory entailed no "limitation on federal power, even in areas such as criminal law enforcement . . . where States have historically been sovereign." *Id.* 1632. Being sovereign in criminal law enforcement means that CLEOs do not take orders from Congress. The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.* at 1633. Congress' commerce clause power is not "a general police power of the sort retained by the States." *Id.* at 1634.

Lopez articulates why the Brady Act is an unconstitutional imposition on the States:

The "States possess primary authority for defining

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[33] *See United States v. Minnick*, 949 F.2d 8, 10-11 (1st Cir. 1991), *cert. denied*, 503 U.S. 995 (1992) (Tenth Amendment not violated by prohibition on felon's receipt of firearm in interstate commerce because "the statute is not directed at states as such, but at individual behavior").

> and enforcing the criminal law." . . . "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States . . . ."

Id. at 1631 n. 3 (citations omitted). The Brady Act usurps the most fundamental element of State sovereignty: the administration of criminal justice.

2. The President and the Federal Executive Branch, Not State CLEOs, Execute Federal Law

U.S. Const., Art. II, § 1 begins: "The executive power shall be vested in a President of the United States of America." § 3 provides that the President--not State CLEOs--"shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."[34] Under § 2, cl. 2, "Congress may by Law vest the Appointment of such inferior Officers" in the President, courts, or in "Heads of Departments." Sheriff Printz has not been appointed or commissioned as a federal officer.[35]

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[34] The Presidency is "designed for the prompt and faithful execution of the laws." *Loving v. United States*, 116 S.Ct. 1737, 64 U.S.L.W. 4390, 4393 (1996). "The clear assignment of power to a branch, furthermore, allows the citizens to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.*

[35] *See, e.g.*, 42 U.S.C. § 14081(b) ("the Attorney General may deputize State and local law enforcement officers"). *Dixson v. United States*, 465 U.S. 482, 510 (1984) (O'Conner, J., joined by Rehnquist, C.J., Stevens, J., and Brennan, J., dissenting on other grounds), states:

> A proper respect for the sovereignty of States requires that federal programs not be interpreted to deputize States or their political subdivisions to act on behalf of the United States unless such deputy status is expressly accepted or, where lawful, expressly imposed. It would be inconsistent with the general relationship between the Federal and State Governments to conclude, absent such express actions, that a State is acting in effect as an agent of the United States.

Art. I, § 8, cl. 18 provides that Congress shall have power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." The federal executive branch enforces Congress' laws, which must be "necessary and *proper*."[36]

The Execution of Laws, Appointments, and Commission Clauses are an interrelated scheme to ensure accountability in the President. [37] This Court has expounded these principles most often in the context of the removal power.[38] Declaring unconstitutional a statute which did not

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[36] "An executory law that regulates subjects outside Congress's enumerated powers is not 'proper' and therefore not constitutional." G. Lawson and P. Granger, *The "Proper" Scope of Federal Power*, 43 DUKE L. JOUR. 267, 330 (1993).

[37] *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890). *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156-57 (1803) (the commission is proof of the appointment, and the officer may not be removable once the commission is received).

[38] A similar check that does not apply to CLEOs is Art. II, § 4, which provides that "all civil officers of the United States, shall be removed from office" on conviction for bribery and other crimes.

allow the President to remove postmasters from office, *Myers v. United States*, 272 U.S. 52, 163-4 (1926) explained that "the vesting of the executive power in the President was essentially a grant of the power to execute the laws." The Execution of Laws Clause implies that "as part of his executive power he would select those who were to act for him under his direction in the execution of the laws." *Id.* The President's executive power includes "the general administrative control of those executing the laws." *Id.*

Buckley v. Valeo, 424 U.S. 1, 135-36 (1976), holding the Federal Election Commission to be unconstitutional, noted that principal and inferior officers may be appointed only as prescribed by Article II, § 2, cl. 2.[39] *Id.* at 126, 132-33. "The Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws." *Id.* at 119. The Brady Act does just that.[40]

CLEOs are not appointed or commissioned by the President, who cannot remove a CLEO for improper execution of or refusal to execute the law. The constitutional checks and balances are upset when Congress conscripts state

[39] By granting the Attorney General and the Department of the Treasury power over CLEOs, the Brady Act treats CLEOs as "inferior officers," which *Buckley* defines as "lesser functionaries subordinate to officers of the United States." *Id.* at 126 n. 162.

[40] *See Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (by entrusting execution of a law to a person not removable by the President, "Congress in effect has retained control over the execution of the Act and has intruded into the executive function."); *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (lack of removal power would leave "no means for the President to ensure the 'faithful execution' of the laws.").

officers.

3. The Constitutional Duties of the States Do Not Include Execution of Federal Criminal Law

The Constitution is explicit when it imposes duties on the States, and none of its provisions empower Congress to impose the commands here. Art. I, § 8, cl. 15 and 16, delegate power to Congress:

> To provide for calling forth the Militia *to execute the Laws of the Union* . . .;
>
> To provide for organizing, arming, and disciplining the Militia, and *for governing such Part of them as may be employed in the Service of the United States*, reserving to the States respectively, the Appointment of the Officers, and the authority of training the militia according to the discipline prescribed by Congress . . . . (Emphasis added.)

The Constitution is explicit where it delegates power to Congress to "call forth" State officers--here, State-appointed militia officers--"to execute the Laws of the Union."[41] Congress is not empowered to call forth CLEOs

[41] Early legislation provided that the President may call out the militia to execute the laws, and "the President's orders may be given to the chief executive magistrate of the state, or to any militia officer." *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 15 (1820). "By the Constitution, the President is not only Commander-in Chief of . . . the militia, when called into service, but he is also . . . bound to see the laws duly executed." J. Story, *A Familiar Exposition of the Constitution of the*

"to execute the Laws of the Union," to "govern" them, or to prescribe their "discipline." *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

Article IV, § 4, provides that the United States "shall protect" each State, "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." This would prevent, Elbridge Gerry explained in the Philadelphia convention, "letting loose the myrmidons of the United States on a state, without its consent." Elliot, *Debates on the Adoption of the Constitution* 438 (1845). Congress' self-styled crusade "against domestic violence" via its subjection of CLEOs to the orders of Congress, the Attorney General, and BATF, all without State consent, obliterates the Domestic Violence Clause.

Article IV, § 2, cl. 2, provides that a fugitive "shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." This authorizes a federal court to order a State governor to extradite a fugitive. *Puerto Rico v. Branstad*, 483 U.S. 219, 227-28 (1987). "Because the duty is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment." *Id.* at 228.

The Constitution is explicit in other places when it

United States §196 (1840). *See Perpich v. Dep't. of Defense*, 496 U.S. 334, 349-51 (1990).

requires State legislatures or executives to fulfill duties. Art. I, §§ 2, 4 , Amendment XVII (election matters); Art. I, § 10, cl. 2 (state duties on imports "shall be for the Use of the Treasury of the United States"). It also explicitly prohibits the States from coining money, engaging in war, and certain other activities, Art. I, § 10, cl. 1, and from violating certain rights. Amendment XIV (due process, equal protection); Amendments XV, XIX, XXIV, and XXVI (voting rights).

"Under our federal system, the States possess sovereignty concurrent with that of the Federal Government." *New York*, 112 S.Ct. at 2421, quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1992). Congress' enumerated powers delegate no more power to issue commands to State officials than the States' reserved powers include a power to issue commands to federal officials. The duties of the State executive branches enumerated by the Constitution simply do not include administration of a federal law like the Brady Act.

III. PORTIONS OF THE BRADY ACT ARE NOT SEVERABLE FROM THE UNCONSTITUTIONAL DUTIES

The three unconstitutional duties imposed by the Brady Act are not severable from the notice requirement, the 5-day waiting period, and CLEO veto power. These provisions would not have been enacted had it not been required that CLEOs check backgrounds to ascertain legality, destroy records to protect the privacy of lawful purchasers, and write explanations of the legal reasons for denials. Accordingly, these provisions of § 922(s)(1) are void.

A. Absent a Duty to Check Records, the Waiting Period Serves no Purpose

§ 922(s)(1)(A)(i) makes it unlawful for a licensed dealer to transfer a handgun unless the dealer obtains a statement containing personal information from the transferee, and then provides notice of its contents, and transmits a copy, to the CLEO where the transferee resides. § 922(s)(1)(A)(ii) provides that the dealer may not transfer the handgun unless: (I) 5 business days have elapsed between the date the notice was furnished to the CLEO and the date of the transfer, during which period the CLEO has not notified the dealer that the sale would violate the law, or (II) the CLEO notifies the dealer that the transfer would not violate the law.

These requirements are inexorably tied to the unconstitutional duty that the CLEO do background checks and ascertain legality. The only purpose of notice and the waiting period is to allow the CLEO to fulfill his background check/ascertainment duties, after which the CLEO can clear the transfer immediately.

§ 922(s)(1)(C) allows anyone with a State firearm permit to purchase a handgun immediately. § 922(s)(1)(D) exempts the entire population of a State which has its own instant check.[42] The waiting period provision expires in 60 months or when the national instant criminal background check system is established, whichever comes first. §

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[42] BATF has determined that there are 24 States where the waiting period does not apply. 59 F.R. 37534 (July 22, 1994).

922(s)(1), (t)(1). Striking the duty of CLEOs to check records destroys the purpose of the waiting period and of the requirement that a dealer provide notice to the CLEO.

The Brady bill never became law as long as it mandated a waiting period and made the record check optional.[43] It passed only when it was revised to mandate a record check and to allow avoidance of the wait. If the duty to check records is severed from the waiting period, the law is transformed into a mandatory, not a maximum, 5 day waiting period, exactly what proponents said it was not to be.

House Judiciary Committee Report 103-344, at 7 (1993) clarifies that the duty to determine legality is not severable from the waiting period: "Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun." Rep. Schiff proposed to strike "shall" and insert "may," to "make the performance of the background check an

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[43] Under H.R. 7, "No duty is created for the chief of police." House Judiciary Committee Report 102-47, at 12 (1991). With an optional check, Rep. Staggers argued, police would check persons from black neighborhoods or foreign sounding names, but not persons from white suburbs or Anglo-Saxon names. 138 CONG.REC. H2668 (May 1, 1991). Numerous speakers objected to the check being optional and not mandatory. *E.g.*, *id.* at H2828 (Inhofe), H2829 (Schaefer), H2831 (Brooks), H2834 (Schiff).

Senator Mitchell noted of H.R. 7's provision "for a waiting period, with no background check necessary," that "the Senate turned down a similar 14-day wait by a 2-1 margin several years ago," and proposed a mandatory check. *Id.* at S9084-85 (June 28, 1991).

option, rather than a requirement, for state and local law enforcement agencies, while keeping the waiting period." Additional Dissenting Views, *id.* at 39. The amendment failed. *Id.*

Averring that the bill "is not supposed to be a national cooling off period," Rep. Schumer, the chief sponsor, opposed Rep. Schiff's proposal because localities or States "wouldn't do the check," so the bill should "say that they 'shall' have to do it." Transcript of Markup on H.R. 1025, House Judiciary Committee, Nov. 4, 1993, at 101, 131. Rep. Sensenbrenner, chief Republican sponsor, who wanted the background checks to be "mandatory" and not "optional," *id.* at 134, reiterated: "The purpose of the waiting period is to give law enforcement a chance to find out if a felon or an illegal alien or an adjudicated mental incompetent is able to buy a firearm or not." *Id.* at 104.

On the House floor, Rep. Schiff raised his proposal to "permit" CLEOs to conduct background checks, as did the Brady bill defeated in the prior Congress, "rather than compel such state[s] to do so," as did the current version, which was "an unfunded mandate on the local police departments." 139 CONG.REC. H9093 (Nov. 10, 1993). He explained:

> H.R. 7 in the last Congress addressed this issue as follows: "Paragraph 1"--that is the background check--"shall not be interpreted to require any action by a chief law enforcement officer which is not otherwise required." . . . The language in this bill has Congress requiring local police departments to take their time and their resources to make a

background check without Federal support.

Rep. Schiff requested a vote on his proposal "to remove the mandate. Keep the 5-day waiting period, but not requiring the local police to do the check." *Id.* at H9094. Rep. Hughes responded that "the mandatory requirement is the right requirement." *Id.* at H9095. A vote on the Schiff amendment was blocked.

The waiting period would not have been adopted without the mandatory check. Rep. Zimmer explained:

> Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. I voted instead for affirmative legislation that provided for an instant, mandatory background check . . . .
>
> The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the waiting period will be eliminated as soon as a national instant check system can be implemented. *Id.* at H9107-08.

Senator Jeffords stated that without the required background checks, the bill should not pass:

> I do not believe that Brady bill waiting periods should be established prior to handgun purchases unless accurate background checks can be made.

Thus, I am not here supporting waiting periods without background checks. 139 CONG.REC. S16416 (Nov. 19, 1993).

Senator Metzenbaum, noting that the CLEO must determine if "the sale would be illegal under Federal, State, or local law," added that "if the police can conduct this background check in less than 5 business days, then the sale can go through sooner." *Id.* at S16306.

Invalidation of the required checks without invalidation of the waiting period would revise the Act to the very form in which it was rejected by Congress: a mandatory wait with an optional check. An optional wait and mandatory check passed. This Court should not allow the version that failed to become the law.

B. The Record Destruction Requirement, which was Intended to Prevent the Registration of Gun Owners, is Not Severable from the Notice Requirement

Striking the unconstitutional command that the CLEO destroy records on the handgun purchaser without also striking the requirement that the dealer provide notice of the handgun transferee's statement to the CLEO rewrites the Act into a form Congress would not have enacted. Congress has consistently rejected the registration of handgun owners.

§ 922(s)(1)(A)(i) requires a handgun purchaser to make a statement including name, address, and date of birth, and prohibits the dealer from transferring the handgun unless the dealer has "provided notice of the contents of the

statement" and "transmitted a copy of the statement" to the CLEO. This would not have passed absent the unconstitutional duty imposed by § 922(s)(6)(B) that, unless the CLEO finds that a transaction would be unlawful, the CLEO shall, within 20 business days after the transferee made the statement, "destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required."

The destruction requirement was a longstanding premise of earlier versions of the Brady bill. In 1988, Rep. Derrick attacked the Brady bill as "gun registration, which the Congress has historically time and time again been against." 135 CONG.REC. H7636 (Sept. 15, 1988). Reps. Rhodes and Feighan countered that the bill required the CLEO to destroy not only the transferee's statement, "but also destroy any copies of the information he may take from the copy." *Id.* at H7642. Rep. Nelson urged that the Brady bill eschewed "gun registration" because "the law requires that form be destroyed." *Id.* at H7645.

H.R. 7 provided for destruction of the transferee's statement and any records derived therefrom. House Rept. 102-47, at 13 (1991). Senator Metzenbaum verified that the bill "does not call for gun registration. The police, under this legislation, must destroy the firearms form within 30 days." S.Hrg. 101-1161, 101st Cong., 1st Sess., at 12 (1991). Rep. Roukema denied that the bill would allow a system of gun registration. 138 CONG.REC. H2836 (May 8, 1991).

Senator Stevens argued that the Brady bill would "encourage local police to compile lists of handgun buyers"

which would lead to registration and confiscation of firearms. *Id.* at S8267 (June 20, 1991). Stevens offered a bill which "prohibits keeping any records" to "eliminate the possibility of an assembly of gun registration lists by local, State, or Federal authorities." *Id.* at S8934 (June 27, 1991). Stevens' bill was defeated, but the Brady bill incorporated a similar destruction requirement. *Id.* at S9681 (June 28, 1991).

Rep. Roukema explained that "the Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days." 139 CONG.REC. H9106 (Nov. 10, 1993). Rep. Hughes agreed: "To help protect the privacy of legal purchasers, it [the bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117.

The Brady Act also requires the reporting of multiple handgun sales to State and local police and the destruction of those records within 20 days. 18 U.S.C. § 923(g)(3). This destruction requirement, Senator Dole explained, "eliminates the concern that this would be back door gun registration." 139 CONG.REC. S16311 (Nov. 19, 1993).

Just as the Act's interim provisions require CLEOs to destroy records, the permanent provisions establishing the national instant check system prohibit the registration of firearm owners. § 103(i) of P.L. 103-159 provides:

> PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.--No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
>
> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions . . .
>
> .

This destruction requirement protects the privacy rights of law-abiding firearms owners in the same manner as they are protected by the Firearms Owners' Protection Act (FOPA), P.L. 99-308, 100 Stat. 449 (1986). FOPA amended 18 U.S.C. § 926(a) to provide that no regulation may require that "records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to" any federal, State, or local government, "nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." Senator McClure explained:

> The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments. 131 CONG.REC. S9163-64 (July 9,

1985).

The record destruction requirement reflects Congress' historical rejection of the registration of handgun owners.[44] Passage of the Gun Control Act of 1968 coincided with defeat of all proposals to require handgun registration.[45] Alarmed in 1978 that BATF tried to require registration through regulations, Congress has prohibited in every Treasury appropriation act passed since then the use of funds for firearm registration.[46]

The record destruction requirement is an essential element of Congress' historic, comprehensive scheme to protect privacy by prohibiting federal, State, and local law enforcement agencies from keeping records on firearms owners. It is the *sine qua non* of § 922(s), without which the requirement that dealers provide information to CLEOs would not have passed. Since the record destruction

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[44] Congress rejected a proposal for pistol registration in the National Firearms Act of 1934, which requires registration of machineguns. 26 U.S.C. §§5841, 5845(a); National Firearms Act: Hearings Before the Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess., 58 (1934).

[45] *See* Federal Firearms Legislation, Hearings before Subcom. to Investigate Juvenile Delinquency, Senate Judiciary Com., 90th Cong., 2d Sess. (1968).

[46] *E.g.*, P.L. 104-52, 109 Stat. 471 (1995) (prohibiting use of funds for "consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees"). *See* Treasury's Proposed Gun Regulations: Hearings before Subcommittee on Crime, House Judiciary Committee, 95th Cong. 2d Sess. (1979).

requirement is unconstitutional, the requirement that dealers provide notice to CLEOs is not severable and is void.

C. The Explanation Requirement is Based on Due Process and is not Severable

A dealer, after sending notice to the CLEO, may not transfer a handgun if the CLEO sends notice that its receipt would violate the law. § 922(s)(1)(A)(ii)(II). The notice requirement and the power of a CLEO to veto a transfer would not have been enacted without § 922(s)(6)(C), which unconstitutionally commands the CLEO to explain why a purchaser is ineligible to receive a handgun.

Without the explanation requirement, a CLEO could arbitrarily veto any or all handgun transfers, even for eligible transferees, and refuse to offer any explanation. § 925A provides that a person denied a firearm due to erroneous information may bring an action to correct the error. This remedy is not viable without the CLEO's written explanation of the reason for the denial.

The duty to explain a denial is not moot if the background check/ascertainment duties are unconstitutional and thus optional. A CLEO may check backgrounds as a service to constituents, who must otherwise wait 5 days and who will thereby hold the CLEO politically accountable. The CLEO is then subject to the unconstitutional command to opine why the purchaser is deemed legally ineligible.

The Dissenting Views in House Judiciary Committee Report 103-344, at 36 (1993) explain why the duty to

disclose reasons for denial is not severable from the CLEO's veto power over transfers:

> H.R. 1025 contains no system to redress a wrongful denial of purchase. If a person improperly is denied his rights, the only redress is to hire an attorney and go to court to prove he or she is law-abiding. This turns the presumption of innocence, on which our legal system is based, upside down. It allows for arbitrary and capricious misuse of the regulatory process by over-zealous or corrupt government officials, resulting in the denial of basic rights to honest citizens.

The House amended the bill, by a vote of 431 to 2, to require that the CLEO provide the reason for a denial. 139 CONG.REC. H99122 (Nov. 10, 1993). As Rep. Towns explained, "the bill opens the door to corrupting influences where local officials could deny any individual the right to purchase a firearm or decide to ban firearms within the whole community for virtually any reason." *Id.* at H9111. Rep. Hoekstra added:

> I support the Brady bill, with the Ramstad amendment that will guarantee the second amendment rights of citizens by requiring law enforcement officials to provide written documentation for any denials that might be rendered. Such a guarantee is essential so that individuals who are denied permission to purchase a gun might be given a written explanation which they may use in the event that they appeal the decision in Federal Court. *Id.*

Judiciary Committee Chairman Brooks stressed why CLEOs must explain denials: "As this bill is written, a person can be denied the right to make a lawful handgun purchase--without any cause, and without any explanation. What could be more fundamental to due process than to require the Government to tell you why you cannot exercise a right that is being exercised by others every day?" *Id.* at H9122.

Since the unconstitutional duty to explain a denial is necessary for due process, this duty is not severable from the requirement that the dealer provide notice and the prohibition on a handgun transfer when the dealer receives an adverse determination from the CLEO. Congress would not have enacted the notice and veto provisions in a form which allow arbitrary denials with no duty to explain.

D. This Court's Precedents Concerning Severability

New York, 112 S.Ct. at 2434, which *sua sponte* determined whether the parts of the statute at issue were severable, explained:

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

A law from which a portion is stricken remains fully operative only if "its elimination in no way alters the

substantive reach of the statute and leaves completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. 570, 586 (1968). The provisions are not "functionally independent" if the "valid and invalid provisions [are] so intertwined that the Court would have to rewrite the law to allow it to stand." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Even if it remains operative, the law must still "function in a *manner* consistent with the intent of Congress." *Id.* at 685.

The interim provisions of the Brady Act fail both tests. Without the duty to check records, the basic operation of the statute is altered from the optional 5-day wait Congress enacted to a mandatory, useless burden on citizens. Without the duty to destroy records, the notice requirement alters the statute's basic operation by allowing the creation of what Congress has always rejected: the registration of firearms owners. Without the duty to explain denials, the Act alters the basic operation of the statute to allow what Congress rejected: arbitrary denials which violate due process. Citizens will seek retribution against CLEOs at the polls or in court for their failure to execute the unconstitutional mandates.

While the Brady Act has no severability clause, 18 U.S.C. § 928, as enacted in 1968, provides: "If any provision of this chapter [Chapter 44] . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby." In *Koog*, the Fifth Circuit concluded that the Brady Act is presumed to be severable because of § 928. 79 F.3d at 463.

Koog acknowledges that the waiting period does not

apply in States with instant checks, permit systems, or other exemptions, and will be replaced by the national instant check system. "These exceptions cast doubt on the notion of an independent 'cooling off' period." *Id.* at 463. However, because of § 928, *Koog* concluded that the waiting period and licensee duties are severable from the invalid duties. *Id.* *Koog* did not discuss the argument that Congress would not have adopted the Act without a duty to destroy records to prevent firearm-owner registration or the duty to explain denials to protect due process.

A separations clause "is an aid merely; not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). *See* 2 Sutherland, *Statutory Construction* § 44.08 (5th ed. 1992) (severability clause not dispositive).

As with the Brady Act, the law at issue in *Alaska Airlines*, the Airline Deregulation Act (ADA), contained no severability clause.[47] 480 U.S. at 686, n. 8. Like the Gun Control Act (GCA), to which the Brady Act was added, the Federal Aviation Act of 1958, to which the ADA was added, did contain such a clause.[48] *Id.* Despite the severability clause in the Federal Aviation Act, this Court concluded that

> the applicability of this clause to § 43 [of the ADA, the Employee Protection Program (EPP)] is in doubt,

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[47] The Airline Deregulation Act was "codified at various sections of Title 49 U.S.C. App." 480 U.S. at 680.

[48] That clause states: "If any provision of this Act . . . is held invalid, the remainder of the Act . . . shall not be affected thereby." §1504, P.L. 85-726.

however, because, unlike many sections of the Deregulation Act, the EPP does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program. *Id.*

This Court used the word "amend" to refer to the insertion of new wording in existing provisions, in contrast to "a new program" which adds something major that did not exist before. The EPP did not remove or insert any new words within existing sentences or paragraphs, but instead created a new section within Title 49 U.S.C. App.

Similarly, § 922(s) did not "amend" the GCA in this sense because, like the EPP, it did not insert new words within existing sentences. Instead, § 922(s) added "a new program," leaving the applicability of the GCA's severability clause to the Brady Act "in doubt."[49]

Further, § 928 states only that, if a provision of "this chapter"--Chapter 44 of Title 18, § 921 through § 930--is invalid, "the remainder of the chapter" is not affected. This precludes the invalidation of a section or subsection leading to the invalidation of the entire *chapter*. This does not suggest that, if a part of a subsection is invalid, the rest of the *subsection* is automatically preserved.

Leavitt v. Jane L., 116 S.Ct. 2068 (1996) reversed a decision that a State would not want to regulate abortion 20

[49] Aside from its reference to "this Act" instead of "this chapter," the pertinent part of the severability clause of the Federal Aviation Act is identical to the severability clause of the GCA.

weeks after gestation if it could not regulate it 20 weeks before gestation. A severability clause radically different than § 928 provided that "if any one or more provision, section, subsection, sentence, clause, phrase or word" is found to be unconstitutional, "the same is hereby declared to be severable." 116 S.Ct. at 2070. "The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact" that something was declared unconstitutional. *Id.*

Finding that the legislature could not have been clearer, this Court continued:

> The two sections at issue here are not "interrelated" in any relevant sense--i.e., in the sense of being so interdependent that the remainder of the statute cannot function effectively without the invalidated provision, or in the sense that the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute. *Id.* at 2070-71.

The Brady Act provisions at issue are "interrelated" in the above senses. Besides the disruption of the effective functioning of the Act caused by the invalidation of the commands to CLEOs, "the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute." *Id.* The record-destruction requirement was the compromise for allowing handgun transactions to be reported to CLEOs.

The mandatory check was the compromise for allowing up to five days wait.[50] The explanation requirement was the compromise for the CLEO's veto power over handgun sales.

Leavitt found it inconceivable that the legislature would not have wanted to regulate any abortions just because it could not regulate some abortions. *Id.* Put simply, "The relevant question is whether the legislature would prefer not to have B if it could not have A as well." 116 S.Ct. at 2072.

It is clear in the case at bar that Congress wanted no waiting period without background checks; wanted no notice to CLEOs without the destruction requirement; and wanted no CLEO veto over handgun sales without the duty to explain a denial. The unconstitutional commands to CLEOs are not severable from these provisions of § 922(s)(1).

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit and should hold that 18 U.S.C. § 922(s)(2), (6)(B) and (C) are beyond Congress' powers under U.S. Const., Article I, § 8, and the Tenth Amendment, and that the notice, waiting period, and transfer-veto provisions of § 922(s)(1)(A)(i)(III), (IV), and (ii), are not severable and are void.

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[50] Senator Kohl favored "time to cool off" in "an ideal world," but the Brady bill "is not a perfect piece of legislation: It is a compromise. . . . The bill before us today represents the best deal we could make to get the votes we need." 139 CONG.REC. S16332 (Nov. 19, 1993).

Respectfully submitted,

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Petitioner

*Counsel of Record

Of Counsel:

James A. Haynes
James A. Haynes Law Office
P.O. Box 544
Hamilton, Montana 59840